

DRAFT KING COUNTY COMMENTS ON S4A

Proposed section S4.A is unacceptable because it purports to make municipal separate storm sewer systems (MS4s) subject to a state law provision regarding wastewater treatment. The proposed subsection S4.A would make MS4s subject to RCW 90.48.520, which applies to discharge permits for "wastewater." The federal water pollution control act (CWA) and the Washington state water pollution control act (WPCA) distinguish between wastewater and storm water. Although they are each a "pollutant" when discharged into a water of the U.S., they are distinctly different pollutants; and the statutes and regulations contemplate that they will be regulated differently. This regulatory distinction reflects the real-world differences between sanitary sewer systems and storm sewer systems. The proposed subsection S4.A does not.

A primary component of the original CWA was its program to build or upgrade sewage treatment plants to provide secondary treatment. That part of the CWA focused on "publicly owned treatment works," or POTWs, which were (and are) defined as systems to collect and treat wastewater.¹ POTWs were (and are) subject to NPDES permitting requirements because their outfalls constitute "point sources" under the CWA.² Much later, amendments to the CWA rendered certain MS4s subject to the NPDES requirement as well.³ The federal regulatory definition of "MS4" specifically excludes treatment works that handle wastewater.⁴ The regulations promulgated under the CWA

¹ See 33 U.S.C. §1292(2)(A)-(B) (defining "treatment works") see also 40 C.F.R. §122.2 ([the term] "*POTW*" is defined at § 403.3 of this chapter." (italics in the original; bracketed material added); see also 40 C.F.R. §403.3(o):

The term *Publicly Owned Treatment Works* or POTW means a treatment works as defined by section 212 of the Act, which is owned by a State or municipality (as defined by section 502(4) of the Act). This definition includes any devices and systems used in the storage, treatment, recycling and reclamation of municipal sewage or industrial wastes of a liquid nature. It also includes sewers, pipes and other conveyances only if they convey wastewater to a POTW Treatment Plant. The term also means the municipality as defined in section 502(4) of the Act, which has jurisdiction over the Indirect Discharges to and the discharges from such a treatment works.

² See 33 U.S.C. §1362 (defining "point source").

³ See 33 U.S.C. §1342(p).

⁴ See 40 C.F.R. §122.26(b)(8) (italics in the original; underlining added):

Municipal separate storm sewer means a conveyance or system of conveyances (including roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, manmade channels, or storm drains):

- (i) Owned or operated by a State, city, town, borough, county, parish, district, association, or other public body (created by or pursuant to State law) having jurisdiction over disposal of sewage, industrial wastes, storm water, or other wastes, including special districts under State law such as a sewer district, flood control district or drainage district, or similar entity, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 208 of the CWA that discharges to waters of the United States;
- (ii) Designed or used for collecting or conveying storm water;
- (iii) Which is not a combined sewer; and
- (iv) Which is not part of a Publicly Owned Treatment Works (POTW) as defined at 40 CFR 122.2.

amendments further define the term "storm water."⁵ Under federal law, then, MS4s are not treatment works; and storm water is not wastewater.

The WPCA and its companion statutes are consistent with the federal CWA. State law recognizes that wastewater comprises water and wastes discharged from homes, businesses and industry to the sewer system, where it is processed by treatment plants such as publicly owned treatment works.⁶

It would be contrary to the structure of the CWA and the WPCA to apply wastewater standards to MS4s. The permit regimes for wastewater and storm water are not interchangeable.⁷ This regulatory distinction reflects the real-world differences between sewer systems and storm sewer systems. Treatment works that handle wastewater properly receive individual NPDES permits conditioned on individual plant performance measures. This is consistent with their basic structure, which typically consist of large but well-documented conveyance systems that terminate in very few treatment plants with effluent and outfalls that can be sampled and monitored with relatively little difficulty. In contrast, MS4s can consist of complex small-scale drainage, piping and outfall systems that drain at numerous locations, many of which are not readily accessible, and in some cases may not be particularly well-documented. The nature of MS4s and their effluent—open to the public and the environment, exposed to the vagaries of interstate and international travel—also makes it very difficult (if not impossible) to control what goes into them.

It was not by accident that Congress specified that regulated MS4s "reduce the discharge of pollutants to the maximum extent practicable."⁸ The "maximum extent practicable" (MEP) requirement in 33 U.S.C. §1342(p)(3)(B)(iii) replaces the water quality standard requirements of §1311 and unambiguously demonstrates that Congress did not require MS4s to comply strictly with §1311(b)(1)(C).⁹ The MEP requirement stands in stark contrast to the CWA's stated goal that discharges of pollutants to waters of the U.S. be "eliminated" by 1985.¹⁰

⁵ 40 C.F.R. §122.26(b)(13) ("*Storm water* means storm water runoff, snow melt runoff, and surface runoff and drainage.") (italics in the original).

⁶ See 90.46.010(7) (defining "wastewater" for purposes of reclaimed water act) ("Wastewater means water and wastes discharged from homes, businesses, and industry to the sewer system."); see also WAC 173-221A-030 (defining "wastewater" for purposes of waste permit regulations) ("Wastewater" means the water or liquid carried waste. These wastes may result from any process or activity, including but not limited to, of industry, manufacturer, trade, business, development of any natural resource, or from animal operations such as feed lots, poultry houses, dairies, or fish rearing operations. The term also includes contaminated storm water and leachate from solid waste facilities.); see also WAC 173-224-030 (defining stormwater for purposes of wastewater discharge permit fees) "Storm water" means an industrial operation or construction activity discharging storm water runoff as defined in 40 CFR 122.26 (b)(14) or facilities that are permitted as a significant contributor of pollutants as allowed in the federal Clean Water Act at Section 402 (p)(2)(E).

⁷ For example, compare 40 C.F.R. §122.21(a)(2)(i)(B) (POTW application requirements); 40 C.F.R. §122.26(d) (large and medium MS4 application requirements).

⁸ 33 U.S.C. §1342(p)(3)(B)(iii).

⁹ *Defenders of Wildlife v. Browner*, 191 F.3d 1159, 1165 (9th Cir. Az 1999) (stating same).

¹⁰ 33 U.S.C. §1251(a)(1).

Against this statutory backdrop, it seems plain that RCW 90.48.520 does not and should not apply to MS4s. The very title of the section ("Review of operations before issuance or renewal of wastewater discharge permits") indicates that it is aimed at POTWs and other wastewater dischargers, not MS4s and other storm water dischargers. And the requirements set forth in RCW 90.48.520—limits on discharges of specific chemicals, limits on overall toxicity, reliance on bioassays, etc.—indicate that the Legislature contemplated discharges that could be readily monitored, assessed, and controlled. MS4s are not readily monitored, assessed, or controlled. POTW outfalls are.

Finally, RCW 90.48.520 was enacted in April of 1987.¹¹ It replaced an earlier statute, which required Ecology to study the feasibility of reviewing and updating existing standards for wastewater treatment.¹² Ecology told the Legislature that it would be expensive to revise existing standards for wastewater treatment, and that it would be better to simply enact new standards.¹³ The Legislature responded by enacting RCW 90.48.520. The federal MS4 permit scheme was added to the federal CWA just a few weeks earlier, in February of that same year.¹⁴ Prior to the MS4 scheme, there was no CWA mandate to control municipal storm water runoff.¹⁵ Even after the MS4 requirements were added, most storm water discharges did not need an NPDES permit until after 1994.¹⁶ It is hardly conceivable that in 1987 the Washington Legislature intended RCW 90.48.520 to apply to then-unregulated storm water discharges. Rather, the Legislature authorized Ecology to enact new wastewater regulations for POTWs and other wastewater treatment providers.

The requirements in RCW 90.48.520 do not belong in a general MS4 permit. The sprawling nature of MS4s renders it virtually impossible to "limit the discharge of specific chemicals" to or from MS4s as would be required under that statute. It would require an enormous infusion of money (potentially billions of dollars) and time (potentially decades) to reinvent MS4s to treat runoff to the level of the treatment plants contemplated in RCW 90.48.520. Such an effort would be equivalent to the original CWA mandate to upgrade wastewater treatment plants to secondary treatment. Surveillance and social initiatives to keep pollutants out of the storm water could potentially cost even more.

Policy initiatives of this magnitude should be instigated through a change in the law by Congress or the state Legislature, not through an obscure condition in an administratively issued general permit. If Ecology wants to require POTW-level treatment of storm water, then Ecology should seek a change in state law, and the Legislature should be prepared to finance the work—and manage the public process to deal with the impacts of the

¹¹ See 1987 Laws of Washington Ch. 500 §1 (ESHB 499).

¹² See 1987 Final Legislative Report for ESHB 499.

¹³ Id.

¹⁴ See P.L. 100-4, Title IV §401-405 (February 4, 1987), 101 Stat. 65-69.

¹⁵ See, e.g., *Defenders of Wildlife v. Browner*, 191 F.3d 1159 at 1163 ("Initially, the EPA determined that [storm water] discharges generally were exempt from the requirements of the CWA.").

¹⁶ Id. (citing 33 U.S.C. §1342(p)).

Attachment C - Bellevue Final Draft NPDES Phase II Comments

projects. To do otherwise would result in an unfunded mandate to local jurisdictions operating MS4s.¹⁷

¹⁷ See, e.g., *City of Tacoma v. State*, 117 Wn.2d 348, 816 P.2d 7 (1991); RCW §43.135.060.